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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-6918

1965 OLDSMOBILE, 2-DOOR SERIAL NO. 2366575x-125066 AND WOODIE ROBINSON,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. EDWARD V. HANRAHAN, STATE'S ATTORNEY OF COOK COUNTY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM.

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JURIS. STATEMENT NOT PRINTED

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PEOPLE OF THE STATE OF ILLINOIS EX REL. EDWARD V. HANRAHAN, STATE'S ATTORNEY OF COOK COUNTY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM.

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Illinois Supreme Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

OPINION BELOW.

The opinion of the Illinois Supreme Court is reported at 52 Ill. 2d 36 (1972) and is contained for the Court's convenience in Appendix A.

QUESTIONS PRESENTED.

Whether pursuant to the State of Illinois' vehicle forfeiture statutes (Appendix B),

(1) the seizure of an automobile suspected of use in an armed robbery (which use in such crime was later supported in the subsequent underlying criminal action reported at 3 Ill. App. 3d 843, 846, 847, 851 (1972) and contained in Appendix C),

(2) the subsequent certified mailing of notice to the appellant car owner's address as statutorily required to be recorded and updated by the appellant in the Secretary of State's Office, Illinois Revised Statutes, 1969, Chap. 95½, Sec. 3-405, 3-414 (Appendix D),

(3) and the later "in rem" forfeiture proceeding in the absence of the appellant or his representative, which civil proceeding employed the "preponderance of the evidence" as its standard of proof,

violated the Due Process clause of the Fourteenth Amendment.

STATUTE INVOLVED.

Illinois Revised Statutes, 1969, Chap. 38, Sec. 36-1 to 36-4 (Appendix B).

STATEMENT.

The appellees object to and wish to supplement certain segments of the appellant's statement.

The use of the word "impossible", in reference to the ability of the incarcerated car owner to receive notice of the forfeiture proceeding is unnecessarily strong and imperfect language in this context. As persons confined in a hospital or on vacation take certain measures to remain

informed of or to arrange the handling of the contents of their mail, so also should persons in jail be expected to exercise that same reasonable precaution. Therefore, for this and other reasons developed in the body of this motion, the appellee recommends the conceptual replacement of "impossible" reception with that of "probable" reception.

It also should be noted that although Woodie Robinson was convicted of robbery rather than armed robbery in a trial conducted subsequent to the forfeiture hearing, the Illinois Appellate Court's description of the facts and evidence in the criminal case indicates that it was convinced that the *car* was used in the offense and an alleged butcher knife wielded in the car was part of the supporting testimony (Appendix C, pp. A. 21-A. 23). As appellee's argument will develop, forfeiture statutes such as Illinois' proceed against the res and not the person. Therefore, the fact that Woodie Robinson was not convicted of armed robbery seems immaterial. In fact, the findings of subsequent criminal proceedings are not particularly essential or relevant to the separate civil action of forfeiture of accessory automobiles. The People merely had to prove at the civil forfeiture proceedings by a preponderance of the evidence that the automobile was used in an armed robbery.

ARGUMENT.

A.

Certified Mailing to Woody Robinson Was Reasonably Calculated Under All the Circumstances to Notify Him of the Pendency of the Forfeiture Action Against His Automobile.

The appellants initially concern themselves with the issue of the Illinois forfeiture statute's notice provision, Ill.

Rev. Stat. 1969, Ch. 38, Sec. 36-1 (See Appendix B) which provides for a certified mailing to an address which the car owner is obligated by law to record and update with the Secretary of State, Ill. Rev. Stat. 1969, Ch. 95½, Sec. 3-405, 3-414 (See Appendix D).

As this brief will develop in the next section, this type of forfeiture proceeding has long been recognized as a civil action proceeding against the property instead of the person. This, of course, categorizes the matter as *in rem,* and the standard of notice in such proceedings has traditionally been less stringent. Contrary to what the appellants suggest by their authority (see appellant's jurisdictional statement, p. 4, par. 3), it is not at all arbitrary to permit less demanding notice requirements in *in rem* actions; rather the nature and practicalities of such actions require reasonable, substitute forms of notice.

This court has utilized such recurrent phrases in treating this issue of adequacy of notice when property is involved as: "in the circumstances of this case," *Schroeder* v. *City of New York,* 371 U. S. 208 (1962), "reasonably calculated under all the circumstances," *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 314 (1949). If this Court would consider the "circumstances of this case," it will surely agree that certified mailing was "reasonably calculated under all the circumstances" to provide notice to Woody Robinson of the pendency of the forfeiture action and an opportunity to arrange the presentation of objections to that proceeding. The majority opinion of the Illinois Supreme Court (See Appendix A), persuasively discussed the impracticality of personal service in the case-at-bar:

> "To require the State to uncover the actual whereabouts of the party in interest in forfeiture proceedings resulting from the commission of a criminal offense would impose an intolerable burden upon the

> State and in effect necessitate personal service in many instances for an action which traditionally has been classified as 'in rem.' Moreover, it is conceivable that many parties in interest in this form of proceeding may be fugitives or may have moved from the address listed with the Secretary of State without notifying the Secretary of their new address as required (by law)." *People ex rel. Hanrahan* v. *1965 Oldsmobile,* 52 Ill. 2d 37, 46 (1972).

If the Court additionally considers that the seemingly normal response of a person in Woody Robinson's incarcerated position would be to request a friend or relative to process or forward his mail, the heavy probability of notice reaching the prisoner results. There also exists the very fact of seizure to put the party on notice. The Illinois case of *Bickerdike* v. *Allen,* 157 Ill. 95, 100 (1897) an *in rem* proceeding, expressed the concept well:

> "The theory of the law is, that when a man's property is brought under the control of the court by seizure, such seizure informs and notifies him of the proceeding taken for its sale or condemnation. In such cases, constructive notice is permitted and becomes effectual solely by reason of the attachment or seizure of the property."

The Illinois statute, of course, goes beyond this by also providing for a certified mailing to the address of the owner of the seized vehicle, which address is required to be recorded and updated within ten days after moving. Illinois Revised Statutes, 1969, Ch. 95½, Sec. 405, 414 (See Appendix D).

The appellants (See appellant's jurisdictional statement, pp. 5-6) and the Illinois Supreme Court's dissent (See Appendix A) also imply that the sheriff, who mailed the notice, had personal knowledge of the imprisoned state of Woody Robinson. If ever there was a collective usage of the word "sheriff," this instance portrays it. Cook County

is a heavily populated community. The Cook County Sheriff's Office employs 2,627 individuals, including 329 police officers (1972 Budget) and serves a population of 5,492,369 (1970 Census) and like any office that size, is departmentalized. To impute the knowledge of the arresting officer upon the serving officer under such circumstances would indeed be unfair.

If these considerations expressed in the Illinois Supreme Court opinion and this brief are not individually conclusive, their cumulative effect should lead the Court to the conclusion that the Illinois statute's notice provisions fulfill the constitutional due process demands of a reasonable method of notice of an impending forfeiture proceeding.

The appellant's authority on notice in relation to due process relies upon such generalities as "reasonably calculated under all the circumstances." *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, 314 (1950), and "at a meaningful time and in a meaningful manner," *Fuentes* v. *Shevin* and *Parham* v. *Cortese*, 40 U. S. L. Week 4692, 4696 (June 12, 1972). A closer examination of the facts and holdings of those cases indicates viable distinctions, which are, in fact supportive of the State's case.

This Court has held that mailed notice was inadequate to meet due process requirements in an *in rem* proceeding in only one highly distinguishable instance—a case involving an incompetent *known to be* without the protection of a guardian. *Covey* v. *Town of Somers*, 351 U. S. 141 (1956). In other cases treating the issue—*Mullane* v. *Hanover Bank and Trust Co. supra, Schroeder* v. *City of New York*, 371 U. S. 208 (1962), and *Walker* v. *City of Hutchinson*, 352 U. S. 112 (1956)—the Court held that *publication* was insufficient notice, at least when the party's address is known, and by dicta that *mailing* would have been sufficient. Therefore, publication has often been viewed as a suspect method of notice, but mailings have almost always

been deemed acceptable, even in many *in personam* actions with the advent of the long-arm jurisdictional statutes. See *Hess* v. *Pawloski*, 274 U. S. 352 (1927); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957).

The companion cases of *Fuentes* v. *Shevin* and *Parham* v. *Cortese*, 40 U. S. L. Week 4692 (June 12, 1972), cited by the appellants, are distinguishable as cases involving unilateral attachment powers given to creditors without a hearing or prior notice to the debtor. Any attempt to draw an analogy between a replevin action and a forfeiture proceeding involving a vehicle used as an integral part in the commission of a crime indeed rings hollow. In fact, in *Fuentes* v. *Shevin, supra*, citing *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1970), this Court recognized the basic differences between seizures by creditors and seizures by the government when it noted that there are "extraordinary situations where some valid governmental interest is at stake," in justifying seizure without notice. Consequently, the *Fuentes* decision which involved a seizure without any notice is not persuasive when considering the adequacy of notice given in a law enforcement context such as herein presented.

Therefore, although personal service more adequately ensures that notice is actually received, administrative difficulties have militated against its constant and absolute use, and the Court has recognized the justification of substitute methods. It is respectfully contended that the method of substitute service employed in the context of the present case should also be recognized as justifiable.

B.

Statutory Forfeiture of Essential Elements in the Commission of Crimes Has Been a Time-Honored Crime-Fighting Device Which the Courts Have Long Recognized as a Civil Proceeding Against the Property.

The appellants also attack the *in rem* civil status of forfeiture actions theorized upon the fact that the State proceeds against the object instead of the person.

Forfeiture proceedings in the United States have long been built upon a statutory basis, directed against the property, the most notable example being the Internal Revenue Code of 1954, 26 U. S. C. § 7301-§ 7323(a).[1] Furthermore, this object-oriented approach has long been accepted as valid. *The Palmyra*, 12 Wheat 1, 25 U. S. 1 (1827); *Dobbins' Distillery* v. *United States*, 96 U. S. 395 (1877); *United States* v. *One 1965 Buick*, 392 F. 2d 672 (6th Cir. 1968). This Court, in *J. W. Goldsmith, Jr.-Grant Co.*, v. *United States*, 254 U. S. 505, 511 (1921) succinctly stated the principle:

"The thing is primarily considered the offender."

The Court has also come to recognize the deep reliance placed upon such statutes by the law enforcement authorities. As it was stated in *J. W. Goldsmith, Jr.-Grant Co.*, v. *United States, supra*, at p. 512, in which an automobile used in bootlegging was forfeited; "it (the civil *in rem* status rationale) is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."

For example, the United States Government employs the method of forfeiture in its fight against organized

1. These laws basically provide for the forfeiture of property removed, deposited, or concealed with intent to defraud the Internal Revenue Service (IRS).

crime. 49 U. S. C. § 81-788 provides for the seizure and forfeiture of vessels, vehicles, and aircraft used in the concealment or transportation of narcotics, illegal firearms, counterfeit documents, etc. Property used in gambling, 18 U. S. C. § 1082 (1958) and in customs violations, 18 U. S. C. § 2274 (1958), is also subject to forfeiture.

This Court, in an IRS fraud case, has reasoned that since such statutes are enacted for the public good, those statutes should be construed fairly and reasonably to carry out the intention of the legislature and are not to be construed strictly in favor of the defendant as are most statutes which provide for penalties. *United States* v. *Stowell*, 133 U. S. 1 (1889).

Mr. Justice Cardozo in *General Motors Acceptance Corp.* v. *United States*, 286 U. S. 49, 56 (1932) summarized well the status of forfeiture in American jurisprudence:

> "Forfeiture of vehicles bearing smuggled goods is one of the time honored methods adopted by the Government for the repression of the crime of smuggling."

Therefore, in reference to our case, to permit the State to forfeit an automobile, which has been used as an essential means in executing the serious offense of armed robbery, is to provide a method whereby the State is better able to carry out its obligation to lawfully repress crime.

It has been established that even innocent owners may suffer the loss of their property through forfeiture even though they were unaware of the property's use in the commission of a crime. In *Van Oster* v. *Kansas*, 272 U. S. 465 (1926), for instance, a forfeiture was upheld even though the owner of the vehicle unwittingly loaned the automobile to another who used it in violation of state liquor laws. However, such a result could not have occurred in the present case for two reasons.

First, sections 36-2 and 36-4 of the Forfeiture Statute (Illinois Revised Statutes, chapter 38 (1969)) virtually eliminate this possibility by allowing the State's Attorney or the Illinois Attorney General to remit the seized vehicle to interest holders, who in good faith had no knowledge of any illegal use to which the automobile would be employed.

Secondly, the status of interest-holder Woody Robinson can hardly be described as innocent. As the related criminal proceeding indicates, *People* v. *Robinson*, 3 Ill. App. 3d 843 (1972) (See Appendix C), Woody Robinson was found guilty of knowingly participating in the robbery, and sentenced to three years probation with the first four months to be served in Cook County Jail. The evidence against the defendant included testimony by the manager of the store which had been robbed that he clearly saw Woody Robinson as the driver of the getaway car when he struggled with Robinson as he attempted to start the car. 3 Ill. App. 3d at 846. Furthermore, a glaring inconsistency exists between the affidavit submitted in the civil proceeding in a motion to reopen the forfeiture case and his testimony at the trial of the criminal charge of armed robbery with regard to the time of the alleged theft of his automobile. In his affidavit (Appendix E) Woody Robinson alleged as point 3 that on June 14, 1970 (two days before he was arrested and charged with armed robbery) he reported said automobile as being stolen. However, at trial, he testified that he discovered his automobile stolen on June 16, 1970, at approximately 9:30 A.M. or 10:00 A.M., which was within an hour of his arrest. (See Appendix C, p. A. 25.) Under these circumstances, Woody Robinson hardly qualifies as an innocent victim of a forfeiture proceeding or a party abused by the State's Attorney's failure to remit the automobile utilized in the crime, but rather can more aptly be described as possessing little credibility.

The appellants cite *Boyd* v. *United States,* 116 U. S. 616 (1886), as authority for the Court viewing a forfeiture proceeding as being basically criminal in nature. However, in *Helvering* v. *Mitchell,* 303 U. S. 391, 400 (1938), a later expression on the subject, it was stated by Mr. Justice Brandeis:

> "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. (Citation omitted.) In spite of their comparative severity such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. (Citations omitted.)"

The *Helvering* Court, in viewing tax case forfeiture proceeding as remedial and compensatory instead of punitive, stated:

> "They [forfeiture sanctions] are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." Supra at p. 401.

Certainly this rationale is equally applicable to the present case since the investigative costs associated with crime fighting are often spectacular.

The appellants also cite the recent cases of *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (1965), and *United States* v. *United States Coin and Currency,* 401 U. S. 715 (1971), which respectively applied the Fourth Amendment exclusionary rule and the Fifth Amendment right against self-incrimination in automobile and money forfeiture matters. However, reference is again made to *Helvering* v. *Mitchell,* where these issues were discussed:

> "In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced. Thus *Hepner* v. *United States*, 213 U. S. 103, 111-112, holding that a verdict may be directed for the government, and *United States* v. *Ryan*, 232 U. S. 37, 50, holding that the Government need not prove its case beyond a reasonable doubt, distinguished *Boyd* v. *United States*, 116 U. S. 616, and *Lees* v. *United States*, 150 U. S. 476, holding that the defendant could not be required to be a witness against himself on the ground that 'the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions.' 232 U. S. at 50 . . ." 303 U. S. 391, 400 n. 3 (1937).

Coffey v. *United States*, 116 U. S. 436 (1886), a case barring post-acquittal forefeitures, also cited in support of appellant's theory, contains facts distinctly different than those before the Court in that at the time of forfeiture, Woody Robinson had not been acquitted, but was, in fact, later convicted of the criminal charge of robbery. Furthermore, *Coffey's* viability as constitutional authority seems greatly weakened by the later decision of *Helvering* v. *Mitchell, supra*, which upheld a money forfeiture proceeding which followed an acquittal in the criminal proceeding.

Finally, the case of *In Re Winship*, 397 U. S. 358 (1970), appears as supportive authority in the appellant's argumentation. It strains the imagination to understand how a juvenile justice case involving the preponderance of the evidence standard has applicability to a forfeiture proceeding against an automobile. Furthermore, the opinion of the Supreme Court of Illinois in the present case (See Appendix A, p. A. 8) and the Illinois Appellate Court's

inion in the criminal case (See Appendix C, pp. A. 28-A.) both noted that the circumstances of this case met the andard of beyond a reasonable doubt.

Consequently, since statutory forfeiture actions have long en considered to be *in rem* proceedings, it is not a denial due process to require the standard of "preponderance the evidence" as the burden of proof to be met by the ate.

CONCLUSION.

For the foregoing reasons, the appellee respectfully re- iests that this Honorable Court dismiss the instant ap- al or, in the alternative, affirm the decision of the Supreme ourt of Illinois for the reason that the questions pre- nted are so unsubstantial as to not require further argu- ent.

Respectfully submitted,

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APPENDIX A.

(52 Ill. 2d 36 (1972))

(No. 44097.—Judgment.)

THE PEOPLE EX REL. EDWARD V. HANRAHAN, State's Attorney, Appellee, v. ONE 1965 OLDSMOBILE ET AL.—(Woodie Robinson, Appellant.)

(Opinion filed March 30, 1972.)

SCHAEFER, *J.*, UNDERWOOD, *C. J.*, and WARD, *J.*, dissenting.

Appeal from the Circuit Court of Cook County; the Hon. JAMES A. ZAFIRATOS, *Judge*, presiding.

Marthe C. Purmal and Alan Dockterman, both of Chicago, for appellant.

Edward V. Hanrahan, State's Attorney, of Chicago (Vincent Bentivenga, Jr., Stephen Richek and Paul P. Biebel, Jr., of counsel), for appellee.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

This appeal is taken from a judgment of the circuit court of Cook County ordering the forfeiture and sale of appellant's automobile pursuant to the Illinois vehicle forfeiture statute. (Ill. Rev. Stat. 1969, ch. 38, par. 36-1 *et seq.*) Appellant, Woodie Robinson, now attacks the constitutionality of this statute.

A complaint was filed on July 30, 1970, stating that a 1965 Oldsmobile, serial No. 2366575X125066, was used by appellant in an armed robbery (Ill. Rev. Stat. 1969, ch. 38, par. 18-2) and requesting that such vehicle be declared for-

feited and sold at public auction. The complaint further stated that notice of the impending forfeiture proceeding was sent to appellant at 6819 S. Green Street, Chicago at which address appellant was noted as the registrant of the vehicle in the records of the office of the Secretary of State.

A default hearing on the forfeiture question was held on August 19, 1970. Officer E. Butz testified that two men had "stuck up" a food store on West 69th Street on June 16, 1970; that the manager of the store, Mr. Pipik, scuffled with one of the robbers whom he later identified as appellant; that the appellant got into a car with the other man and drove off. He further testified that the manager, pursuing in his own vehicle, stopped a police officer and, after explaining what had transpired, both followed the fleeing automobile to 6707 South Peoria where it was abandoned. About ten minutes later appellant and another man approached the vehicle and appellant was identified as one of the holdup men and arrested.

Sergeant Roy Peters testified that he checked with the office of the Secretary of State in Springfield, and ascertained that the automobile in question was registered in the name of appellant whose address was 6819 S. Green St., Chicago. Peters then sent a certified letter to appellant at that address. At the conclusion of this hearing, the trial court found that the vehicle described in the complaint was used in the commission of an armed robbery while in appellant's control and possession; that the vehicle was lawfully seized by the Chicago police; and "[t]hat each and all of the persons entitled to notice of the seizure and forfeiture were properly notified according to the statute made and provided." The court then ordered that appellant's vehicle be forfeited and sold at public auction.

On Noveember 24, 1970, a "Motion for Re-Hearing," with appellant's affidavit, was filed requesting that the order of forfeiture of the automobile be vacated because:

(1) appellant did not receive notice of the seizure or forfeiture of the vehicle since he was incarcerated in the Cook County jail from June 16 (the date of his arrest) until October 7, 1970 (the date of his trial for armed robbery); (2) he had not been tried on the armed robbery charge when the forfeiture proceeding was held and, consequently, it had not been shown that the vehicle had been used in the commission of the offense; and (3) appellant had reported the theft of his automobile on June 14, 1970, two days before he was arrested for armed robbery. Thus he asserted that he had been deprived of his property without due process of law.

Section 36-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 36-1 provides in part: "Any * * * vehicle * * * used with the knowledge and consent of the owner in the commission of an offense prohibited by (a) Section * * * 18-2 * * * of this Code * * * may be seized and delivered forthwith to the sheriff of the county of seizure. Within 10 days after such delivery, the sheriff shall give notice of seizure to each person according to the following method: Upon each such person whose right, title or interest is of record in the office of the Secretary of State * * * by mailing a copy of the notice by certified mail to the address as given upon the records of the Secretary of State * * *. Within that 10 days period the sheriff shall also notify the State's Attorney of the country of seizure about the seizure."

Section 36-2(a) (Ill. Rev. Stat. 1969, ch. 38, par. 36-2(a)) further provides: "The State's Attorney * * * if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the owner * * * to violate the law, or finds the existence of such mitigating circumstances as to justify remission of the forfeiture, may cause the sheriff to remit the same * * *. The State's Attorney shall exercise his discretion * * * promptly after

notice is given in accordance with Section 36-1. If the State's Attorney does not cause the forfeiture to be remitted he shall forthwith bring an action for forfeiture in the Circuit Court within whose jurisdiction the seizure and confiscation has taken place. The State's Attorney shall give notice of the forfeiture proceeding by mailing a copy of the Complaint in the forfeiture proceeding to the persons, and upon the manner set forth in Section 36-1.* * * The State shall show at such hearing by a preponderance of the evidence that such * * * vehicle* * * was used in the commission of an offense described in Section 36-1."

Appellant now argues that the forfeiture statute is unconstitutionally vague because it fails to define the meaning of "commission of an offense," in that no standards are established for the determination of whether the offender must be convicted prior to confiscation of his property, or the procedures available if the offender is tried and acquitted or not tried at all.

Appellant fails to recognize the traditional application of a forfeiture proceeding. It has been held that such a proceeding is a civil action *in rem* against an item which was used in the commission of an offense. (*People* v. *Moore* (1951), 410 Ill. 241; *State* v. *1960 Mercury Station Wagon* (1963), 5 Conn. Cir. 1, 240 A. 2d 99.) "In this country, however, forfeiture exists only by virtue of statute; and it is generally recognized that where a statute merely provides for a proceeding *in rem* for the forfeiture of illicit goods or property used in connection therewith or in connection with a statutory violation, and the forfeiture statute does not expressly or impliedly provide for a prior conviction of the individual offender, such a conviction is not a prerequisite to the forfeiture." (3 A. L. R. 2d 738, 740; see also *Various Items of Personal Property* v. *United States* (1931), 282 U. S. 577, 580, 75 L. Ed. 558, 560, 51 S. Ct. 282.) An examination of the Illinois statute does not demon-

strate an intent to provide the necessity of a conviction prior to forfeiture.

Moreover, in *People ex rel. Ward* v. *1963 Cadillac Coupe* (1967), 38 Ill. 2d 344, we held that the failure of the State's Attorney to file a forfeiture action until 3½ months after the seizure was violative of the statutory directive that action be promptly taken to determine if the vehicle be returned or proceedings instituted. To require that the forfeiture proceedings await the outcome of criminal action could result in an unreasonable delay, precluding the State's Attorney from promptly instituting a forfeiture action as required by law.

We need not consider the charge in the present case that the statute is vague because it does not provide guidelines to determine if forfeiture exists in a situation where a defendant is acquitted or not tried at all on the offense charged. In the pleadings filed by appellant herein he alleges only that he did not receive notice of the proceedings and that his car had been previously stolen; but no allegation is made that he was not involved in the armed robbery nor that the car was used without his consent or knowledge in the commission of the offense. Appellant's sworn affidavit indicates only that his trial on the charge of armed robbery was held on October 7, 1970. The record does not supply the factual context necessary for determination of these issues and this court will not render a decision involving abstract propositions merely to establish precedent. *Siefferman* v. *Johnson* (1950), 406 Ill. 392.

Appellant further argues that the forfeiture statute is constitutionally defective because it does not specify how the vehicle may be initially seized. We reject this contention, for the complaint asserts that the vehicle was taken by the police and delivered to the sheriff and the facts clearly demonstrate that probable cause existed to justify the police seizure of the vehicle. Furthermore, only after

a judicial determination may the vehicle be ordered forfeited and sold, thereby safeguarding the rights of the owner.

It is also contended that the statute unconstitutionally grants lawmaking power to the State's Attorney charged with enforcement of the statute. Appellant bases this contention upon section 36-2 of the statute which grants the State's Attorney the authority to return the seized item prior to a hearing. This discretion must be exercised "promptly" after notice of the seizure is received from the sheriff. If the State's Attorney finds the forfeiture was incurred without willful negligence or intent to violate the law by the owner, or if he "finds the existence of such mitigating circumstances as to justify remission of the forfeiture," he can order the sheriff to return the property. This is accomplished without a judicial review and no standards for the exercise of this discretion are supplied by the legislature. Thus, appellant contends, the State's Attorney's discretion is absolute.

Legislative authority is not invalidly delegated where, as here, discretion is granted as to the execution of the law which is exercised under the law and in conformance with it. *(People ex rel. Barrett* v. *Logan County Building and Loan Assn.* (1938), 369 Ill. 518, 527.) Moreover, the court has stated that acts of the State's Attorney are, in part, discretionary and not purely ministerial, and it is presumed that the State's Attorney performs his duties in accordance with law. *(People ex rel. Hayne* v. *Newcomer* (1918), 284 Ill. 315, 324.) From the facts presented we cannot say that the State's Attorney abused his discretion by initiating the forfeiture action in accordance with the directives of the statute.

Appellant also maintains that the statute is not aimed at contraband *per se*, such as gambling devices and narcotics, but rather is invoked as additional punishment for

e commission of an offense, resulting in an abuse of the ate's police power by depriving him of property which its nature is not harmful. This court has recognized at property whose intrinsic nature does not make it con- aband *per se* may nevertheless be subject to confiscation pending upon its use. *(People* v. *Moore* (1951), 410 Ill. 1, 252; see also *Goldsmith, Jr.—Grant Co.* v. *United States* 921), 254 U. S. 505, 65 L. Ed. 376, 41 S. Ct. 189.) The cts indicate that appellant's vehicle was an integral part the crime. "Forfeiture of vehicles * * * is one of the ne-honored methods adopted by the Government for the pression of the crime of smuggling." *(General Motors ceptance Corporation* v. *United States* (1932), 286 U. S. , 56, 76 L. Ed. 971, 975, 52 S. Ct. 468.) We perceive no lid distinction in the confiscation of a vehicle used for uggling and the seizure of one which is used to facilitate mmission of an alleged felony.

Appellant further maintains that the forfeiture statute olates section 11 of article II of the 1870 Illinois constitu- n which provides that "no conviction shall work * * *] forfeiture of estate * * *." We find no constitutional olation, for the forfeiture statute is not dependent upon a ior conviction, and if property is declared subject to izure and confiscation appellant could not claim a right to wnership or possession. *People* v. *Moore* (1951), 410 Ill. 1, 247.

It is also argued that appellant was denied due process law because the State need only prove its position that e vehicle was used in the commission of an offense by a eponderance of the evidence rather than beyond a reason- le doubt. "Overwhelming authority unequivocally holds at the essential facts must be established by a prepon- rance of the evidence and not beyond a reasonable ubt." (*One 1961 Lincoln Continental Sedan* v. *United ates* (8th cir. 1966), 360 F. 2d 467, 469.) A forfeiture pro-

ceeding is civil in form and as stated by Justice Harlan, "In a civil suit * * *, we view it as no more serious in general for there to be an erroneous verdict in defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate * * *." *In re Winship* (1970), 397 U. S. 358, 371, 25 L. Ed. 2d 368, 379, 90 S. Ct. 1068 (concurring opinion).

Assuming, however, the validity of his contention, the record in the present case meets the more rigid standard of proof. Appellant's only allegation tending to mitigate the forfeiture of his vehicle is that two days prior to the robbery he reported that the vehicle had been stolen. However, it is clear that the store manager, after the holdup, followed appellant's vehicle and discovered it abandoned. Several minutes later, appellant approached, was identified as one of the perpetrators and arrested. These facts negate any inference which may arise from his contention that the vehicle was previously stolen.

Appellant next contends that the forfeiture statute violates due process of law by failing to provide adequate notice requirements. He further argues that the statutory provision requiring that notice by certified mail be sent to the address listed in the records of the Secretary of State is insufficient as applied to him, for he was incarcerated at the time the notice was sent and he never received it. The court has held that other than personal service may be sufficient for *in rem* proceedings. (*Vickerdike* v. *Allen* (1895), 157 Ill. 95, 100.) Notice which satisfies the requirements of due process must be reasonably calculated under the circumstances to inform parties of proceedings which may directly and adversely affect their legally protected interests (*Mullane* v. *Central Hanover Bank and Trust Co.* (1949) 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652), and the reasonableness of the form of notice must not be less likely

to inform the party than other "feasible and customary substitutes." (339 U. S. at 315, 94 L. Ed. at 874.) In *Schroeder* v. *New York* (1962), 371 U. S. 208, 9 L. Ed. 2d 255, 83 S. Ct. 279, the court recognized that notice by mail, when the address of the landowner was easily ascertainable from tax records, would be sufficient to fulfill due-process standards in proceedings to divert a stream.

By law, the correct address of the vehicle owner is required to be registered in the office of the Secretary of State. (Ill. Rev. Stat. 1971, Ch. 95½, par. 3-405.) Thus, notice sent by mail to that address complies with constitutional standards of due process, for it is reasonably intended to provide the owner an opportunity to answer the allegations of the complaint.

The trial court's forfeiture order states that all persons entitled to notice of the proceedings were notified pursuant to the statutory directives. To require the State to uncover the actual whereabouts of the party in interest in forfeiture proceedings resulting from the commission of a criminal offense would impose an intolerable burden upon the State and in effect necessitate personal service in many instances for an action which traditionally has been classified as *in rem*. Moreover, it is conceivable that many parties in interest in this form of proceeding may be fugitives or may have moved from the address listed with the Secretary of State without notifying the Secretary of their new address as required. Ill. Rev. Stat. 1971, ch. 95½, par. 3-416(a).

Finally, appellant argues that the trial court erred in failing to grant his motion for rehearing and for vacating the prior forfeiture order, for no responsive pleadings were filed by the State denying the substance of his motion and affidavit and his allegations must therefore be taken as true. Appellant maintains that his motion was filed pursuant to section 72 of the Civil Practice Act (Ill. Rev. Stat. 1969, ch. 110, par. 72). However, we have held that

when a pleading absolutely fails to state grounds for liability, its insufficiency may be challenged at any time (*Wagner* v. *Kepler* (1951), 411 Ill. 368, 371). "This doctrine of waiver is not applicable where the motion is so defective that it will not sustain an order under section 72." (*Schuman* v. *Department of Revenue* (1967), 38 Ill. 2d 571, 574.) Appellant's affidavit stated two facts. First, he was in jail and did not receive notice of the forfeiture proceedings; and secondly, he had reported that his automobile had been stolen two days prior to his arrest. As heretofore determined neither ground is a basis for reversal. Thus appellant's pleadings were fatally defective and the trial court properly overruled his motion.

For the aforementioned reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

MR. JUSTICE SCHAEFER, dissenting:

Mr. Chief Justice Underwood, Mr. Justice Ward and I are of the opinion that it is necessary to consider only one of the numerous issues raised by the appellant. I think that the trial court lacked jurisdiction to adjudicate the forfeiture of the automobile involved in this case. It is undisputed that Woody Robinson, the owner, was held in the Cook County jail, in the custody of the sheriff of that county, from June 16, 1970, to October 6, 1970. Jurisdiction in the forfeiture proceeding, which was begun and terminated during that period, is predicated upon notice mailed by the sheriff to Robinson at 6819 South Green, Chicago, Illinois 60621, his address as listed in the records of the Secretary of State. But the mailing of notice to that address was a meaningless gesture in this case, because the sheriff was himself making it impossible for Robinson to receive mail so addressed by holding him in jail.

It is not enough to say that the action was *in rem*, and therefore substituted service was permissible. In *Mullane* v. *Central Hanover Bank and Trust Co.* (1949), 339 U. S. 396, 94 L. Ed. 865, 70 S. Ct. 652, after commenting on the vagueness of the classifications "in rem, or more indefinitely quasi in rem, or more indefinitely still, 'in the nature of a proceeding in rem,' " Mr. Justice Jackson said: "But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. • • • An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections." 339 U. S. at 312, 314, 94 L. Ed. at 872, 873.

In the present case the sheriff knew that Robinson was not at the address to which the notice was mailed and knew also that he could not get to that address because the sheriff was holding him in jail. It cannot be said, therefore, that there was any notice in this case which was reasonably calculated to apprise Robinson of the pendency of the proceeding, and the judgment of the circuit court should be reversed.

UNDERWOOD, *C. J.*, and WARD, *J.*, join in this dissent.

APPENDIX B.

CHAPTER 38—CRIMINAL LAW AND PROCEDURE.

Article 36. Seizure and Forfeiture of Vessels, Vehicles and Aircraft

Sec.

36—1. Seizure.

36—1a. Rights of Lienholders and Secured Parties.

36—2. Action for Forfeiture.

36—3. Exceptions to Forfeiture.

36—4. Remission by Attorney General.

Article 36 was added by act approved Aug. 10, 1965. L. 1965, p. 2868.

36-1. § 36-1. Seizure.) Any vessel, vehicle or aircraft used in the commission of an offense prohibited by Section 9-1, 10-2, 18-2, 19-1, 19-2, 20-1, 20-2 or 28-1 of this Code as now or hereafter amended, or prohibited by Section 3, 37 or 38 of the "Uniform Narcotic Drug Act", approved July 11, 1957, as amended,[1] may be seized and delivered forthwith to the sheriff of the county of seizure. Within 15 days after

1. Chapter 38, §§ 22-3, 22-39, 22-40.

Final legislative action, 1969 General Assembly:

P. A. 76-1109—June 19, 1969.
P. A. 76-1136—June 24, 1969.
P. A. 76-1340—May 29, 1969.

As to the effect of more than one amendment of a section at the same session of the General Assembly, see People ex rel. Hines v. Baltimore & O. S. W. R. Co., 366 Ill. 318, 8 N. E. 2d 655; S. Buchsbaum & Co. v. Gordon, 389 Ill. 493, 59 N. E. 2d 832; People ex rel. Brenza v. Fleetwood, 413 Ill. 513, 109 N. E. 2d 741; People ex rel. Dickey v. Southern Railway Company, 17 Ill. 2d 550, 162 N. E. 2d 417; Apex Motor Fuel Company v. Barrett, 20 Ill. 2d 395, 169 N. E. 2d 769.

such delivery, the sheriff shall give notice of seizure to each person according to the following method: Upon each such person whose right, title or interest is of record in the office of the Secretary of State, the Director of the Department of Aeronautics, the Administrator of the Federal Aviation Agency, the Director of the Department of Public Works and Buildings, or any other Department of this State, or any other state of the United States if such vessel, vehicle or aircraft is required to be so registered, as the case may be, by mailing a copy of the notice by certified mail to the address as given upon the records of the Secretary of State, the Department of Aeronautics, Department of Public Works and Buildings or any other Department of this State or the United States if such vessel, vehicle or aircraft is required to be so registered. Within the 15 day period the sheriff shall also notify the State's Attorney of the county of seizure about the seizure.
Amended by P. A. 76-1109, § 1, eff. Aug. 28, 1969.

Amendment by P. A. 76-1136, § 1, see § 36-1, post.

Amendment by P. A. 76-1340, § 1, see § 36-1, post.

36-1. § 36-1. Seizure.) Any vessel, vehicle or aircraft used in the commission of, or in the attempt to commit as defined in Section 8-4 of this Code, an offense prohibited by Section 9-1, 10-2, 18-2, 19-1, 19-2, 20-1, 20-2 or 28-1 of this Code as now or hereafter amended, or prohibited by Section 3, 37 or 38 of the "Uniform Narcotic Drug Act," approved July 11, 1957, as amended,[1] may be seized and delivered forthwith to the sheriff of the county of seizure. Within 10 days after such delivery, the sheriff shall give notice of seizure to each person according to the following method: Upon each person whose right, title or interest is of record in the office of the Secretary of State, the Director of the Department of Aeronautics, the Administrator of the Federal Aviation Agency, the Director of the Depart-

1. Chapter 38, §§ 22-3, 22-39 and 22-40.

ment of Public Works and Buildings, or any other Department of this State, or any other state of the United States if such vessel, vehicle or aircraft is required to be so registered, as the case may be, by mailing a copy of the notice by certified mail to the address as given upon the records of the Secretary of State, the Department of Aeronautics, Department of Public Works and Buildings or any other Department of this State or the United States if such vessel, vehicle or aircraft is required to be so registered. Within the 10 day period the sheriff shall also notify the State's Attorney of the county of seizure about the seizure.

Amended by P. A. 76-1136, § 1, eff. Aug. 28, 1969.

Amendment by P. A. 76-1109, § 1, see § 36-1, ante.

Amendment by P. A. 76-1340, § 1, see § 36-1, post.

36-1. § 36-1. **Seizure.)** Any vessel, vehicle or aircraft used with the knowledge and consent of the owner in the commission of an offense prohibited by (a) 9-1, 10-2, 18-2, 19-1, 19-2, 20-1, 20-2 or 28-1 of this Code, as now or hereafter amended; (b) Section 3, 37 or 38 of the "Uniform Narcotic Drug Act", approved July 11, 1957, as now or hereafter amended[1]; (c) Section 21, 22, 23, 24 or 26 of the "Cigarette Tax Act", approved June 2, 1941, as now or hereafter amended,[2] if the vessel, vehicle or aircraft contains more than 10 cartons of such cigarettes; or (d) Section 28, 29 or 30 of the "Cigarette Use Tax Act", approved July 11, 1951, as now or hereafter amended,[3] if the vessel, vehicle or aircraft contains more than 10 cartons of such cigarettes; may be seized and delivered forthwith to the sheriff of the county of seizure. Within 10 days after such delivery, the sheriff shall give notice of seizure to each person according to the following method: Upon each such

1. Chapter 38, §§ 22-3, 22-39, 22-40.
2. Chapter 120, §§ 453.21 to 453.24, 453.26.
3. Chapter 120, §§ 453.58 to 453.60.

person whose right, title or interest is of record in the office of the Secretary of State, the Director of the Department of Aeronautics, the Administrator of the Federal Aviation Agency, the Director of the Department of Public Works and Buildings, or any other Department of this State, or any other state of the United States if such vessel, vehicle or aircraft is required to be so registered, as the case may be, by mailing a copy of the notice by certified mail to the address as given upon the records of the Secretary of State, the Department of Aeronautics, Department of Public Works and Buildings or any other Department of this State or the United States if such vessel, vehicle or aircraft is required to be so registered. Within that 10 days period the sheriff shall also notify the State's Attorney of the county of seizure about the seizure.

Amended by P. A. 76-1340, § 1, eff. Sept. 16, 1969.

Amendment by P. A. 76-1109, § 1, see § 36-1, ante.

Amendment by P. A. 76-1136, § 1, see § 36-1, ante.

36-1a. § 36-1a. **Rights of Lienholders and Secured Parties.)** The State's Attorney shall promptly release a vessel, vehicle or aircraft seized under the provisions of this Article to any lienholder or secured party whose right, title or interest is of record as described in Section 36-1 if such lienholder or secured party shows to the State's Attorney that his lien or secured interest is bona fide and was created without actual knowledge that such vessel, vehicle or aircraft was used or to be used in the commission of the offense charged. Added by act approved Aug. 10, 1965. L. 1965, p. 2868.

36-2. § 36-2. **Action for Forfeiture.)** (a) The State's Attorney in the county in which such seizure occurs if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the owner of the vessel, vehicle or aircraft or any person whose right,

title or interest is of record as described in Section 36-1, to violate the law, or finds the existence of such mitigating circumstances as to justify remission of the forfeiture, may cause the sheriff to remit the same upon such terms and conditions as the State's Attorney deems reasonable and just. The State's Attorney shall exercise his discretion under the foregoing provision of this Section 36-2(a) promptly after notice is given in accordance with Section 36-1. If the State's Attorney does not cause the forfeiture to be remitted he shall forthwith bring an action for forfeiture in the Circuit Court within whose jurisdiction the seizure and confiscation has taken place. The State's Attorney shall give notice of the forfeiture proceeding by mailing a copy of the Complaint in the forfeiture proceeding to the persons, and upon the manner, set forth in Section 36-1. The owner of the seized vessel, vehicle or aircraft or any person whose right, title, or interest is of record as described in Section 36-1, may within twenty days after the mailing of such notice file a verified answer to the Complaint and may appear at the hearing on the action for forfeiture. The State shall show at such hearing by a preponderance of the evidence, that such vessel, vehicle or aircraft was used in the commission of an offense described in Section 36-1. The owner of such vessel, vehicle or aircraft or any person whose right, title, or interest is of record as described in Section 36-1, may show by a preponderance of the evidence that he did not know, and did not have reason to know, that the vessel, vehicle or aircraft was to be used in the commission of such an offense or that any of the exceptions set forth in Section 36-3 are applicable. Unless the State shall make such showing, the Court shall order such vessel, vehicle or aircraft released to the owner. Where the State has made such showing, the Court may order the vessel, vehicle or aircraft destroyed; may order it delivered to any local,

municipal or county law enforcement agency, or the Department of Public Safety of the State of Illinois; or may order it sold at public auction.

(b) A copy of the order shall be filed with the sheriff of the county in which the seizure occurs and with each Federal or State office or agency with which such vessel, vehicle or aircraft is required to be registered. Such order, when filed, constitutes authority for the issuance of clear title to such vehicle, aircraft, or boat to the department or agency to whom it is delivered or any purchaser thereof. The sheriff shall comply promptly with instructions to remit received from the State's Attorney or Attorney General in accordance with the provisions of Sections 36-2(a) or 36-3.

(c) The proceeds of any sale at public auction pursuant to Section 36-2 of this Act, after payment of all liens and deduction of the reasonable charges and expenses incurred by the sheriff in storing and selling such vehicle, shall be paid into the general fund of the county of seizure. Added by act approved Aug. 10, 1965. L. 1965. p. 2868.

36-3. § 36-3. **Exceptions to Forfeiture.)** (a) No vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier may be forfeited under the provisions of Section 36-2 unless it appears that (1) in the case of a railway car or engine, the owner, or (2) in the case of any other such vessel, vehicle or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto.

(b) No vessel, vehicle, or aircraft shall be forfeited under the provisions of Section 36-2 by reason of any act or omission established by the owner thereof to have been

committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any state. Added by act approved Aug. 10, 1965. L. 1965, p. 2868.

36-4. § 36-4. **Remission by Attorney General.)** Whenever any owner of, or other person interested in, a vessel, vehicle, or aircraft seized under the provisions of this Act files with the Attorney General before the sale or destruction of such vessel, vehicle, or aircraft, a petition for the remission of such forfeiture the Attorney General if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the owner or any person whose right, title or interest is of record as described in Section 36-1, to violate the law, or finds the existence of such mitigating circumstances as to justify the remission of forfeiture, may cause the same to be remitted upon such terms and conditions as he deems reasonable and just, or order discontinuance of any forfeiture proceeding relating thereto. Added by act approved Aug. 10, 1965. L. 1965, p. 2868.

APPENDIX C.

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WOODIE ROBINSON, Defendant-Appellant.

(3 Ill. App. 3d 843 (1972).)

(No. 55628; Judgment affirmed.)

First District—February 4, 1972.

Appeal from the Circuit Court of Cook County; the Hon. LOUIS B. GARIPPO, *Judge*, presiding.

Gerald W. Getty, Public Defender, of Chicago, (John T. Moran, Jr. and James J. Doherty, Assistant Public Defenders, of counsel,) for appellant.

Edward V. Hanrahan, State's Attorney, of Chicago, (Robert A. Novelle and Thomas Mulroy, Jr., Assistant State's Attorneys, of counsel,) for the People.

Mr. PRESIDING JUSTICE LORENZ delivered the opinion of the court:

Defendant with his co-defendant, Bernard Jackson, was indicted and tried for the offense of armed robbery. The court, sitting without a jury, found defendant guilty of plain robbery and sentenced him to probation for three years, the first four months of which to be served in the Cook County Jail. Co-defendant Jackson was found not guilty. On appeal defendant contends:

(1) that pre-trial identifications of him constituted a denial of due process which rendered the subsequent in-court identification testimony inadmissible, and

(2) that he was not proven guilty beyond a reasonable doubt.

The evidence presented by the State is summarized as llows:

Susan Hadac testified that on June 16, 1970, she was orking as a cashier at Certified Food and Liquors, 1906 'est 69th Street. At approximately 10:15 A. M. two male egroes walked into the store and purchased some inex- ensive items. As the witness was making change to com- ete the transaction she was handed a note which told her put the money from the cash register into a bag. She opened the cash register and put a package of ten dollar lls into a paper bag and one of the men then reached to the open cash drawer and grabbed a package of five llar bills. The other man turned toward the courtesy oth, but, upon hearing the manager coming, he and the her robber ran out of the store. The shorter man, whom e never saw again, wore a red or bright colored shirt. he taller man wore a white T-shirt partially covered by a pped shirt. She testified that Jackson was one of the en who robbed the store but she was not completely sure her identification. Shortly after the robbery she attended ine-up consisting of four men but she was unable to make positive identification of any of them.

Peter Popik testified that on June 16, 1970, he was work- g as the manager of Certified Food and Liquors at 1906 est 69th Street. At approximately 10:15 A. M., while in elevated area of the courtesy booth which overlooked e check-out area, he saw two men, one of whom he identi- d as Jackson, approach the check-out counter where they rchased some small items. As the girl at the counter closed e cash register one man handed her a note. The girl ened the register and removed money which she placed in paper bag. Jackson started to come toward the courtesy oth, but, as the witness came down to floor level, both bbers fled the store with Popik in pursuit. The robbers tered a car driven by a third man, a negro who was

wearing a red shirt and whom Popik identified in court as defendant. The witness attempted to pull the driver out of the car as he attempted to start it. At the drivers's command Jackson, who was sitting in the back seat, lunged at Popik with a butcher knife forcing him to back away from the vehicle. The vehicle then started, proceeded approximately ten or fifteen feet and stalled thereby enabling Popik to copy the license number and again approach the car before it sped away. In a few moments a car driven by a customer of the store came upon the scene. Popik got into the car and together with the driver gave chase. After a short time they flagged down a police car which Popik entered. After hearing Popik's story, the police, with Popik in the car, continued the pursuit of the robbers. The robbers' car was found abandoned in the 6700 block of Peoria Street. Popik was then transferred into an unmarked police car to cruise the area in search of the robbers. After approximately ten minutes they received a radio call to return to the abandoned car because the police had "two suspects." Upon returning to the car he saw defendant and Jackson, the only two negroes at the scene, standing near the car. Popik recognized both men, defendant as the driver of the getaway car and Jackson as one of the men who entered the store. Later, at a police station, the witness viewed the two men again, and reaffirmed that he was sure of their identity. While in the first police car he gave the following general descriptions to the police: the driver whom Popik subsequently identified as defendant was a short, thin male negro, approximately 40 years old, medium weight and wore a short sleeved sports shirt and wash pants; the robber, whom Popik identified as Jackson, was a male negro in his late teens and wore wash pants and a short sleeved sports shirt; the other robber was also a male negro in his late teens and wore wash pants and a short sleeved sports shirt. When Popik viewed the two suspects

the scene of the abandoned car, defendant was dressed e same as he was at the time of the struggle, but Jackson's othing was different from that which he wore at the time the robbery. When Popik gave the description to the lice officers, he did not include in that description any ention of the suspects' complexion, facial hair or hair yle, and at the time of the struggle he did not notice anying unusual about defendant's face.

Helen Sennese testified that at 10:15 A.M. on June 16, 70, she was working in the courtesy booth at the Certid Store at 1906 West 69th Street. Two men came into e store, one walked to the cashier and the other approached the witness with a gun. When the store manager me, both robbers ran out of the store. Approximately minutes after the robbery the witness viewed a line-up d identified Jackson as one of the robbers.

Police Officer John Finnegan testified that he was uising with other officers in a marked squad car. As they proached 67th Street and Morgan they were flagged wn by a man who stated that he had "just been involved a robbery." The man got into the police car, and, tother with the police, searched the area for the getaway r which the man described. They located the car, which as unoccupied and unlocked, at 6707 South Peoria. The mplaining witness then entered another police car to ur the area while Finneegan parked close to the andoned vehicle. Within a short time two men, defendt and Jackson, approached and attempted to enter the andoned vehicle. As defendant and Jackson stood near e abandoned vehicle talking to Finnegan and other police ficers, the complaining witness returned to the scene and mediately identified defendant. Both defendant and ckson were then arrested. Neither had a large amount of oney at the time of their arrest. Finnegan did not

remember either the clothing defendant wore at the time of his arrest or any scars on defendant's face.

The evidence presented by the defense is summarized as follows.

Perry Bradley testified for the defense that he knew defendant for three years and Jackson for six years. As Bradley left his house at 9:00 A.M. on the morning of June 16, 1970, to go to the grocery store, he saw the police near a car parked in front of his house. He believed this car belonged to defendant. At approximately 9:10 A.M., as Bradley was returning from the store, he saw defendant, with Jackson and two other young men, standing in a vacant lot at 68th and Green. Bradley informed defendant of the interest of the police in his car and drove defendant and Jackson to the place where the car was parked. As he pulled next to the car, Bradley stopped to allow defendant and Jackson to leave the car and then drove on to find a parking space. He returned to find both defendant and Jackson handcuffed. On cross-examination, Bradley demonstrated his lack of certainty with respect to the time the events of June 16, 1970 took place.

Wilbert Belser testified that on June 16, 1970, he was working as the assistant manager of a food store at 6810 South Halsted. At approximately 10:00 A.M., as he went outside of the store to put money in a parking meter, he saw and greeted Jackson, whom he had known for eight years.

Woodie Robinson, the defendant, testified that he is five feet, six inches tall, weighs 138 pounds and is 43 years old. On the day of his arrest he wore a brown shirt, black pants and a mustache and had a two and a half to three inch scar on the left side of his face. He woke up at approximately 9:30 A.M. or 10:00 A.M. on June 16, 1970, and went out to his car to get a package of cigarettes, but he found that

he car was gone. Defendant then walked to the gas station t 67th Street and Halsted where he was going to telephone he police. Instead he met Jackson with whom he walked o 67th Street and Green where they joined some other people who were standing on the corner. They all talked or a while and defendant decided to go to the police station to report the theft, but before he left "Percy" drove up and said, "Woodie, your car is parked down in front of my house and the police have it." Defendant responded, "Come on, take me down there." At defendant's request Jackson went along. Upon their arrival at defendant's car a police officer asked defendant if it was his. Defendant esponded affirmatively and was arrested and handcuffed. Defendant did not know anything about the robbery and did not have keys to his car when he was arrested.

Bernard Jackson testified that he was 18 years old. On he day of his arrest he wore tan levis, a black leather acket, a white T-shirt and a mustache and had only $1.35 n his possession. While returning from a laundromat on he morning of his arrest, he met defendant and they discussed the car theft and what action defendant should take. Perry Bradley drove up and informed defendant of the whereabouts of his car. Bradley drove defendant and Jackson to the car. When defendant told the police it was is car he was arrested. Jackson said he did not rob the tore. The line-up at which Jackson was identified consisted of himself and shorter men.

OPINION

(1) Defendant's first contention relates to two confrontations wherein defendant was viewed and identified y Popik. The first of these confrontations occurred near efendant's car within 30 minutes of the robbery. He urges hat the nature of this identification procedure made his dentification as a participant in the robbery inevitable. Prompt "on-the-scene" identification procedures were re-

cently discussed by the Illinois Supreme Court in *People* v. *Elam* (filed January 14, 1972), Docket No. 42441, where the court repeated its holding that this type of confrontation does not violate the principle announced in *United States* v. *Wade* (1967), 388 U. S. 218; *Gilbert* v. *California* (1967), 388 U. S. 263; and *Stovall* v. *Denno* (1967), 388 U. S. 293. In so doing the Court quoted with approval the language in *Bates* v. *United States* (D. C. Cir. 1968), 405 F. 2d 1104, 1106 where the court said:

> "There is no prohibition against a viewing of a suspect alone in what is called a "one-man showup" when this occurs near the time of the alleged criminal act; such a course does not tend to bring about mis-identification but rather tends under some circumstances to insure accuracy. The rationale underlying this is in some respects not unlike that which the law relies on to make an exception to the hearsay rule, allowing spontaneous utterances a standing which they would not be given if uttered at a later point in time."

In further discussion of the *Bates* case our Supreme Court went on to say:

> "The court further observed that such procedure fosters the desirable objectives of fresh, accurate identifications which may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing offender while the trial is fresh."

See also *People* v. *Young* (1970), 46 Ill. 2d 82, 87 and *People* v. *McMath* (1968), 104 Ill. App. 2d 302, 314 *aff'd.* (1970), 45 Ill. 2d 33, 36 *cert.* denied (1970), 400 U. S. 846.

1. In his reply brief defendant urges that the theory of *People* v. *Young, supra,* and *People* v. *McMath, supra,* is only applicable in those cases wherein "hot pursuit and continuity of observation" are involved. This theory is dispelled by an analysis of the decision in *People* v. *Elam,*

supra. In that case the Court applied the theory of *People* v. *Young, supra,* to a situation in which there was no continuous observation of defendant from the time of the offense until his apprehension. Rather the defendant was apprehended after being observed on a street corner by the complaining witness who, shortly after being robbed, had been cruising the area with the police in an attempt to locate the offender. Thus Popik's identification of defendant near his car shortly after the robbery did not constitute a denial of due process.

2, 3. The second confrontation of which defendant complains was conducted at a police station where the defendant, while handcuffed, was brought before Popik who was asked if he was sure of the defendant's identity. In the instant case as in *People* v. *McMath* (1970), 45 Ill. 2d 33, 37 *cert. denied* (1970), 400 U. S. 846, there were no circumstances to justify such a confrontation. But just as the Supreme Court did in *People* v. *McMath* we find that while the police station confrontation was unnecessarily suggestive it was not so conducive to irreparable mistaken identity that defendant was denied due process. There is no deprivation of due process where an in-court identification is based on an origin independent of a suggestive confrontation. Popik's in-court identification did have such an independent origin, this being the close observation he had of defendant while struggling with him in trying to prevent his driving away in the car immediately after the robbery.

(2) Defendant's contention that he was not proven guilty beyond a reasonable doubt revolves around three facets of the evidence presented at trial: (a) the failure of the identification witness to notice and describe defendant's mustache and scar, (b) suggestive tactics used by the police which contributed to Popik's identification of defendant, and (c) defendant's uncontradicted alibi.

4, 5. The question of the identifying witness' failure to notice or describe defendant's mustache and scar is controlled by *People* v. *Catlett* (1971), 48 Ill. 2d 56, 63, which states that "precise accuracy in describing facial characteristics is unnecessary where an identification is positive." (See also *People* v. *Miller* (1964), 30 Ill. 2d 110, 113.) Additionally, Popik's failure to mention defendant's facial characteristics is not a prerequisite to identification but merely goes to the weight to be attached to the identification testimony. *People* v. *Tunstall* (1959), 17 Ill. 2d 160, 163.

6. Defendant argues that suggestive police tactics, *i.e.*, the use of the show-up as opposed to a line-up, influenced his identification by Popik. However, insofar as the tactics of the police did not require a suppression of the identification testimony, consideration of this contention also relates to the weight and credibility to be accorded the identification testimony. *People* v. *Bass* (1968), 101 Ill. App. 2d 259, 266 and *People* v. *Brown* (1967), 86 Ill. App. 2d 163, 171.

7. Defendant also contends that a reasonable doubt of his guilt was raised by his alibi testimony which he believes was corroborated by Bradley's testimony, the improbability of a guilty person's return to the getaway car in full view of the police and his failure to possess the car keys or a large amount of money at the time of his arrest. The trial court, however, is not obligated to believe defendant's alibi testimony, *People* v. *Pierre* (1969), 114 Ill. App. 2d 283, 294, *cert. denied* (1970), 400 U. S. 854, especially in a situation such as in the instant case where corroborating testimony does not extend to the time during which the crime was committed.

8, 9. Examination of the law applicable to the contentions advanced by defendant in his attempt to demonstrate that he was not proven guilty beyond a reasonable doubt

als that they all relate to the credibility to be attached
ne testimony of various witnesses by the finder of facts.
ever, this court may not substitute its determination
ne weight and credibility to be given to the testimony
ne witnesses for that of the trial court unless its deter-
ation is palpably erroneous. See *People* v. *Arndt*, 50
2d 390.

analyzing the circumstances surrounding Popik's
tification of defendant, it is evident that at the initial
-up Popik immediately, unequivocally and positively
tified defendant as the driver of the getaway car. Popik
fied that defendant was wearing the same red shirt at
show-up as he wore when he drove the getaway car.
car which belonged to defendant was established both
ts license number and its description to be the one
h was used in the robbery.

ne judgment of the Circuit Court is affirmed.

Judgment affirmed.

CKER and ENGLISH, *JJ.*, concur.

APPENDIX D.

(Ill. Rev. Stats. 1969.)

CHAPTER 95½—MOTOR VEHICLES.

3-405. § 3-405. **Application for registration.** (a) Every owner of a vehicle subject to registration hereunder shall make application to the Secretary of State for the registration of such vehicle upon the appropriate form or forms furnished by the Secretary of State and every such application shall bear the signature of the owner written with pen and ink and said signature shall be acknowledged by the owner before a person authorized to administer oaths and said application shall contain:

1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;

2. A description of the vehicle including such information as is required in an application for a certificate of title, and including the motor power stated in figures of horse power, determined under such standard rating as may be prescribed by the Secretary.

3. Such further information as may reasonably be required by the Secretary of State to enable him to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title.

(b) When such application refers to a new vehicle purchased from a dealer the application shall be accompanied by a Manufacturer's Statement of Origin from the dealer, and a statement showing any lien retained by the dealer.

3-414. § 3-414. **Notice of change of address or name.** (a) Whenever any person after making application for or ob-

taining the registration of a vehicle shall move from the address named in the application or shown upon a registration card or certificate of title such person shall within ten (10) days thereafter notify the Secretary of State in writing of his old and new addresses.

(b) Whenever the name of any person who has made application for or obtained the registration of a vehicle is thereafter changed by marriage or otherwise such person shall within ten (10) days notify the Secretary of State of such former and new name.

APPENDIX E.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

IN THE CIRCUIT COURT OF COOK COUNTY
County Department—Law Division.

STATE OF ILLINOIS,
Plaintiff,
vs.
WOODIE ROBINSON,
Defendant.
} No. 70 ML 600272.

AFFIDAVIT.

Now comes Woodie Robinson and being duly sworn says as follows:

1) That he was the owner of a 1965 Oldsmobile Starfire 2 Door automobile, Serial No. 366575X125066.

2) That said automobile was purchased on April 16, 1970 for the total sum of $1,385.00 as shown by the attached bill of sale.

3) That on June 14, 1970 he reported said automobile as being stolen and a theft report was accordingly prepared by the Chicago Police Department as shown by the attached copy thereof.

4) That on June 16, 1970 he was arrested and charged with armed robbery.

5) That from June 16, 1970 to October 7, 1970 he was incarcerated in the Cook County Jail.

6) That he never received notice that said automobile was seized and was to be sold pursuant to Chapter 38 Article V 36 § 36-1 to § 36-4.

7) That he did not ascertain that said automobile had been seized and sold until after October 7, 1970.

8) That had he received notice he would been able to present evidence on his behalf.

9) That the trial in the matter of the armed robbery charge was heard on October 7, 1970.

/s/ Woodie Robinson.
Woodie Robinson

Subscribed and Sworn to before me this 24th day of November A. D., 1970.

/s/ Irma Thearance,
Notary Public.

Marthe Purmal,
839 West 64th Street,
Chicago, Illinois 60621,
Phone: 873-9600,
Attorney for Defendant.